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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

In re GEORGE F. EMBLEN.

ORIGINAL No. 9.

Mandamus to the Secretary of the Interior.

RELATORS REPLY BRIEF.

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RELATOR'S REPLY BRIEF.

STATEMENT.

Upon *original* application to this Court jurisdiction in *mandamus* is never assumed, nor is the rule to show cause ever granted, "unless such a *prima facie* case is made out, supported by affidavit, as *makes it the duty* of the court to interfere."

Postmaster-general *vs.* Trigg, 11 Pet., 173, 174.

Such is the rule then specifically announced, frequently reiterated, and ever since adheared to so rigidly. Upon special request, unusual opportunity was accorded respondent, and all parties in interest, to present argument and authorities against relator's application.

None were filed. Perhaps, presumably, because no comforting reason or authorities rewarded the diligence of counsel.

Jurisdiction having been taken, another month was allowed, within which to show cause why the writ should not be granted.

Upon return to the rule *nisi*, all matters, as well of fact as of law, which might avail against the issuance of the *peremptory* writ, may, and should, be set forth.

Ex parte Newman 14, Wall., 152.

As the entire record is in possession of respondent; as a former Commissioner, necessarily familiar with all the details, is here of counsel for the Lincoln Land Co., it is but fair to presume that if there existed any fact which might militate against the cause of relator, the attention of the court would have been specifically called thereto, in response to the rule to show cause.

No return was however made.

A brief, merely, has been filed contending that the court erred in assuming jurisdiction, asking that its orders herein be rescinded, and the cause dismissed for want of jurisdiction.

Under approved modern practice in mandamus, technical prolixity and ancient forms are discarded; and the rule *nisi* supersedes the alternative writ.

Ganin *vs.* Rugg, 148 U. S. 228.
The Amr. Co. *vs.* Railway, 148 U. S. 372.
Ex parte U. S., 16 Wall 699.
Hudson *vs.* Parker, 156 U. S. 277.
Ex parte Parker, 120 U. S. 737.
In re Morrison, 147 U. S. 14.

No return having been made to the rule every fact well pleaded in the petition must be presumed true, as upon demurrer.

Ex parte Newman, 14 Wall. 152, 166-7.

The court is now therefore called upon to determine the

cause upon its merits; and to award or to deny the peremptory writ, as justice and the law demands.

Marbury *vs.* Madison, 1 Cr. 137, 154.

THE FACTS.

Under pretext of "An Act to *perfect the title* to a quarter section of land in the town of Yuma, Colorado," Congress, in effect, and in fact, arbitrarily assumed supreme *appellate jurisdiction of a judicial controversy*, then pending and undetermined in the Land Department; utterly ignored and disregarded the supreme executive and judicial authority of the Secretary; reversed his specific findings and decision therein; and, in haughty defiance, issued its peremptory writ of *mandamus* commanding the Secretary to issue and to deliver the patent of the United States of America, under its great seal, and signed by the President, to an individual who had been caught in the act of stealing government property, and "*perfecting his title*" thereto by perjury and subornation of perjury.

Against the consummation of such outrage, the solemn protests of the Secretary and of the Commissioner, were wholly unavailing.

Such are the facts.

If the Congress of the United States has power to pass such an act the courts are powerless to grant relief.

"The presumption is conclusive that the legislature acts with full knowledge, and in good faith."

U. S. *vs.* Des Moines Con. Co. 149 U. S., 510, 544.

Fletcher *vs.* Peck, 6 Cr. 87.

THE ISSUES OF LAW.

I.

Has Congress the right under the Constitution to pass such an act?

II.

If it has not such power, in what manner, and to what extent, can the courts afford relief?

Before submitting the result of our researches upon these momentous problems we desire to discuss, and to dispose of, the propositions contended for in

RESPONDENT'S BRIEF.

A.

As "a complete answer" to our petition, it is contended that, for as much as, in the exercise of its *original* jurisdiction in mandamus, this court has no authority to direct the performance of a purely *ministerial* act, it is powerless to grant Emblen the relief prayed for herein!

As we have not asked for performance by the Secretary of anything in the nature of a *ministerial* act the force or application of the argument is not manifest.

B.

His second proposition is still more irrevelant.

Assuming that this court has a jurisdiction, which confessedly it has not, fifteen pages are devoted to a lucid demonstration that it would be erroneous to exercise it. And he then vigorously contends that neither this court, nor any other court, has any right *in mandamus*, to direct, or to control, the Secretary in the exercise of his official discretion or judgment.

As this court has never sanctioned the exercise of such power by any court; and as we have not in any manner, or for any purpose, invoked such aid, it is difficult to understand the zeal and satisfaction with which counsel discusses this so abtruse proposition.

C.

RELIEF IN EQUITY.

Without claim or title whatever to this land, save a mere preference right of entry, conditioned upon securing the cancellation of Weed's entry, and the restoration of the land to the public domain; with Weed's entry confirmed, and patent issued; with our contest forever suspended; we are advised that in a court of equity full relief may be afforded us! Hence, having other and adequate remedy, mandamus will not lie.

Thereupon, abandoning all hope or desire for relief by mandamus, we hastened to the Department of Justice to invoke its aid, that in the name and by the authority of the United States, proceedings in equity might be at once instituted in our behalf, to right our great wrongs, get even with Congress, and recover our long lost, long sought, prize.

But, alas! our swelling breast and bubling hopes were rudely shocked; from the cold storage department of that august sanctuary came forth the solemn assurance that we had—

D.

NO RIGHTS—LEGAL OR EQUITABLE.

"As Emblen had not yet secured the cancellation of Weed's entry; and as the statutes gave him *no right prior to that time*, he had *no interest* in this land to enable him to make complaint of the disposition Congress had made of it."

E.

CONGRESS SUPREME.

Counsel next earnestly contends that because *Emblen* had no *vested* interest in this land, the dominion of Congress remained unimpaired and supreme; and that the Act in ques-

tion was, therefore, a valid exercise of legislative power against which the courts were powerless to grant relief.

But surely counsel forgot that, under all the authorities he cites with so much satisfaction, when Weed made final proof, paid the purchase price, and secured the government receipt entitling him to patent in due course, the land was thereby *segregated from the public domain;* and that whether Weed's cash entry was in lawful compliance with the requirements of law or not, *Congress had no power* whatever to make grant, gift, or other disposition thereof, until, if ever, Weeds entry might be cancelled, and the land thus restored to the public domain.

If it be true that at the time of the passage of this act Congress had supreme dominion over this land, were Weed as honest and deserving a man as ever pre-empted and paid for government land, yet could Congress utterly repudiate his lawful claims, and donate it to Emblen, or to anybody it choose.

If Congress had legislative dominion over the land at that time for any purpose, it had it for all purposes.

There is no middle ground.

As far as Weed was concerned if his cash entry was lawful, he had the absolute and unquestioned right to a patent without further, or any, special or general legislation.

Weed's corruption and infamy, and the consequent triumph of Emblen, alone necessitated his resort to Congress for protection and relief. He knew too well that, at the rehearing ordered by the Secretary, any repetition of perjured proofs meant for him a long and painful sojourn at Detroit.

F.

Litigants have no rights in the judicial determination of their cases which Congress is bound to respect.

Such is the startling doctrine contended for by the Department of Justice of the United States—in this case.

Upon proper application, and in due course, "after careful consideration of the entire record" the secretary reverses prior rulings, and remands the cause for further hearing in conformity with his decision.

While the cause was so pending and undetermind in that department, neither this, nor any other court, would presume to question, or interfere with, this decision, right or wrong.

Altiazaruz *vs.* Min Co., 148 U. S. 80.
Germania Co., *vs.* U. S., 58 Fed. 334.

But counsel here gravely contends that as Emblen had no *"vested right" in this decision* of the Secretary, Congress had supreme power—legislative and judicial—to overrule and annul it; and, by special act, to deprive Emblen of his supreme triumph secured thereby.

Strange indeed, after demonstrating so lucidly that the Supreme *judicial* power had no authority, in any manner, to direct or control the acts of the Secretary, ministerial, executive or judicial, yet that the legislative department assuredly had such power, and could freely and lawfully exercise it.

G.

Justification under the Act.

It is finally contended that *when* the Secretary justifies himself under this act, even if *unconstitutional*, the writ cannot issue. It was his duty to obey this Congressional mandate, right or wrong, void or valid!

As the Secretary has not attempted to justify himself under an act he had so vigorously denouuced; and as it is conceded that this court has ever declared that there can be no justification whatever under a void act, it is not readily understood why this thunderbolt was reserved for the last.

RELATOR'S ARGUMENT.

I.

THE ACT IS VOID.

A.

When public lands are surveyed, and offered for sale ANY ENTRY, FILING, OR CLAIM THERETO, *lawfully initiated under and in pursuance of the homestead or preemption laws,* SEGREGATES *the land so entered,* FILED UPON OR CLAIMED, *from the public* DOMAIN, AND UNTIL THAT ENTRY, FILING OR CLAIM HAS BEEN ANNULLED OR CANCELLED, AS BY LAW AUTHORIZED, *and the land* THUS RESTORED TO THE PUBLIC DOMAIN, CONGRESS HAS NO LAWFUL DOMINION OVER IT.

Such is the doctrine necessarily and logically deduced from *the facts* disclosed, and *the law* as applied to the facts, *in every case* adjudicated by this Court.

Language is indeed used in some cases, notably the Frisbee Whitney, and Yosemite Valley cases, which announce the doctrine that until all conditions precedent are complied with, a *vested right* is not secured, and that the dominion of Congress remains supreme.

But in neither of these cases, indeed in no case, do *the facts* or *the law* applied thereto, warrant such declaration.

As declared by Marshall, C. J., in Cohen *vs.* Virginia, 6 Wh. 264, 394.

"It is a maxim not to be disregarded, that *general expressions,* in every opinion, are to be taken in connection with *the case in which those expressions are used.* If they go beyond the case, they *may be respected, but ought not to control the judgment* in a subsequent suit where *the very point is presented for decision.*

"The reason of this maxim is obvious. The question *actually before the court is investigated with care, and considered to its full extent,* and those principles which serve to illustrate it,

are considered in their relation *to the case decided; but their possible bearing on all other cases is seldom investigated.*"

In no reported case has the interference of Congress with the *incohate* rights of settlers *lawfully initiated* been sustained; in every case—and rightfully—it has been denied.

Careful scrutiny and analysis of the *facts*, and of *the law as applied* thereto, in all the great leading cases irresistably lead to these conclusions—logical, reasonable and just.

Wilcox *vs.* Jackson, 13 Pet. 498.
Dunmeyer Case, 113 U. S., 529.
U. S. *vs.* Southern Pacific, 146 U. S., 570.
Borden *vs.* Northern Pacific, 145 U. S., 535.
Ard *vs.* Brandon, 158 U. S., 85.
Whitney *vs.* Taylor, 158 U. S., 85.
Weeks *vs.* Bridgman, 159 U. S.
Stoddard *vs.* Chambers, 2 How., 284.
Shepley *vs.* Cowan, 91 U. S., 336.
Leavenworth Ry. *vs.* U. S., 92 U. S., 733.
Frisbie *vs.* Whitney, 9 Wall. 187.
Yosemite Valley Case, 15 U. S., 77.
Hastings Ry. *vs.* Whitney, 132 U. S., 357.
Campbell *vs.* Wade, 132 U. S., 34.
Monroe Cattle Co. *vs.* Becker, 147 U. S., 47.
U. S. *vs.* M. K. & E., 141 U. S., 358.
Noble *vs.* Union Co., 147 U. S., 165.
Wirth *vs.* Branson, 98 U. S., 118.
F. L. & T. Co. *vs.* Chicago Ry., 39 Fed., 163.

As in fact Weed had made final proof and secured the final certificate of the government entitling him to patent, under all the authorities, the land was no longer "*territory* or *property belonging to the United States*" so as to enable Congress "*to dispose of*" or to "*make needful rules and regulations respecting it*," as by the Constitution alone authorized.

Art. IV, sect. 3, par. 2.

In pursuance of general laws, then and still in force, this land had been already "disposed" of, and the power of Congress exhausted, or absolutely suspended, until it might be

mayhap, by the recission of the contract, and the cancellation of Weed's cash entry, again restored to the public domain.

Weeks *vs.* Bridgman, 159 U. S.

B.

THE ACT WAS NUGATORY AND INEFFECTUAL FOR ANY PURPOSE.

It purported merely to *confirm* Weed's entry, and "to *perfect his title*" to this land.

As under all the adjudged cases, and by every recognized principle of juctice, Weed's fraudulent entry and title were absolutely void, there was no "entry" to confirm, no "title" to perfect.

"Void things are no things and incapable of ratification."

Weeks *vs.* Bridgman, supra.

Though perhaps an unpardonable sin "*to impugn the known truth,*" yet we assert with confidence, as an acknowledged principle in law, that claim to government lands cannot be "initiated" nor the title thereto "perfected" by perjury or subornation of perjury; that the bounty of the government can alone be secured by honest compliance with the law; that the officers of the government are but the agents, of and under, the law, and have no power to abate one jot or title of its requirements; that failure to conform to the requirements of the law *is in violation of it;* and that when the officers and agents of the government and of the Land Department are imposed upon and deceived, muniments of title thus secured, as in the case at bar, are absolutely void, though upon the face thereof perfect.

Garland *vs* Wynn, 20 How., 6.
Wilcox *vs.* Jackson, 13 Pet., 498.
Stoddard *vs.* Chambers, 2 How., 284.
U. S. *vs.* M. K. & T. 141 U. S. 358.
Monroe Cattle Co., *vs.* Beeker, 147 U. S. 47.
Turner *vs.* Sawyer, 150 U. S. 578.

Ard *vs.* Brandon, 155 U. S. 537.
Shipley *vs.* Cowan, 91 U. S. 330.
Weeks *vs.* Bridgman. 159 U. S. ——

C

BOLDLY ATTEMPTING TO USURP THE EXECUTIVE AND JUDICIAL FUNCTIONS OF THE INTERIOR DEPARTMENT, THE ACT WAS VICIOUSLY VOID.

Of suits and contests touching conflicting claims to Government lands,—mining, mineral and agricultural,—jurisdiction is entrusted to a variety of tribunials, national and state, constitutional and legislative.

Rarely indeed do controversies arise in which greater interests are involved, or in which there is expended so vast an amount of money.

If Congress possesses the power to dispose of this controversy thus arbitrarily and summarily what limit is there to its power?

What litigant over mining, mineral, agricultural or other government property, is safe?

The greater the value of his property, or of the interests involved, the greater the danger of the mighty "member from Podunk"—*unless he is seen.*

"*Procul, O! procul, este profani!*"

It is, indeed, meet in these degenerate days of "gold brick" statesmen and "silver tipped" legislative "promoters," to recur to the precious words of wisdom and of warning of the mighty men of old.

A magnificent memorial of Marshall adorns the Capitol of the nation.

But how much more magnificent and enduring are the sublime and inspiring memorials of his own creation in his lofty utterances from this bench!

Whatever of noble sentiment, whatever of supreme wisdom, whatever of purest patriotism, whatever of humanity, what-

ever of honor, truth and justice has been uttered and illustrated in the lives of men, nowhere in the annals of mankind can loftier, sublimer expression or illustration thereof be found than in the records of the Bench and Bar.

On a memorable and painful occasion—Marbury *vs.* Madison, 1 Cr. 137, 175-6—touching the Constitution and the distributive powers of government Marshall, C. J.—

"This original and supreme will (of the people) organizes the government, and assigns to different departments their respective powers."

"It may either stop here, or establish certain limits *not to be transcended* by those departments."

"The government of the United States is of the latter description."

"The powers of the legislature are defined and limited; and that those limits may not be forgotten or mistaken, the Constitution is written."

"To what purpose are powers limited, and to what purpose is that power committed to writing, if these limits, may, at any time, be passed by those intended to be restrained?"

"The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed; and if acts prohibited and acts allowed, are of equal obligation."

"It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; *or that the legislature may alter the Constitution by an ordinary act.*"

"Between these allernatives there is no middle ground."

"The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."

"If the former part of the alternative be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its nature illimitable."

II.

The Act being void, the Patent Issued "Solely in Pursuance Thereof," must also be void.

The historic and very interesting case of Liecester *vs.* Heydon, so admirably reported by Plowden, 384, is directly in point. It has received the approval of the greatest of law givers and is conclusive of the doctrine contended for.

But this court has again and again declared that patents issued in contravention of law are absolutely void.

Weeks *vs.* Bridgman, 159 U. S.—.

In Shepley *vs.* Cowan, 91 U. S., 336, it was declared by Mr. Justice Field—

"A sale is as much *prohibited by a law of Congress*, when to allow it, would defeat the *object of the law*, as though the inhibition were in direct terms declared."

"What is done in fraud of a law is done in violation of it."

The William King, 2 Wh. 148.

Lee *vs.* Lee, 8 Pet. 44.

"Fraud will vitiate any, even the most solemn transactions; and an asserted title to property founded upon it, is utterly void."

Story J. in U. S. *vs.* the Armistead, 15 Pet. 518, 594.

"Judgment as well as grants obtained by fraud or collusion are void and confer no title."

Taney C. J. League *vs.* De Yound, 11 How. 177, 203.

III.

Mandamus is the Proper Remedy.

In McPherson *vs.* Blacker, 146 U. S. 1 it was assumed and declared, without question or argument, that where there are two conflicting acts, one valid and the other void, it is ocmpetent, and proper practice, in mandamus, to ask the

court to declare the one act unconstitutional, and to command action under the valid act.

The special act complained of herein being void, and the patent issued thereunder equally so, the contest remains pending and undetermined in the Land Department.

It is within the power of the Secretary alone, and his peculiar province and duty, to dispose of this contest.

Knight *vs.* U. S. Land Assn., 142 U. S. 101.
McDaid *vs.* Oklahama, 150 U. S. 209.

He declines solely by reason of this void act.

No such excuse can avail.

A void act confers no power; and can not justfy acts either of omission or commission.

Board of Liquidation *vs.* McComb, 92 U. S. 531.
Norton & Shelby Co., 118 U. S., 425.
Osborne *vs.* Bank, U. S. 9 Wh., 738.
Virginia Coupon Cases, 114 U. S., 269.

IV.

This Court has Original Jurisdiction Herein.

The sole purpose of this application is to require the Secretary to reinstate a judicial controversy properly pending before him and to adjudicate the same in due course.

Under a mistake as to the law and his duty the cause was dismissed or suspended.

It is his duty now to act.

We destinctly disclaim all authority to direct or to control his discretion or judgment; we merely desire him to proceed with the contest in due course.

This court has never refused to grant the writ under such circumstances.

It is strictly within the sphere of its original appelate jurisdiction.

"It is the ESSENTIAL CRITERION of *appellate jurisdiction* that it revises and corrects the proceedings in a cause *already instituted*, and does not *create that cause*."

Marbury *vs.* Madison, 1 Cr. 137, 173-6.
In re Hohorst, 150 U. S., 653.
N. Y. *vs.* Wilson, 8 Pet., 291.
Ex parte Parker, 120 U. S., 737.
Hudson *vs.* Parker, 156 U. S., 277.
In re Swan, 150 U. S., 637.
Ex parte Robinson, 19 Wall., 513.
In re Penn. Co., 137 U. S., 451.

In Cohen *vs.* Virginia, 6 Wh. 254, 384, Marshal C. J.—

"The judicial powers of every well constituted government must be co-extensive with the legislative, and must be capable of deciding *every judicial question which grows out of the constitution and laws.*"

"If any proposition may be considered as a political axiom, this, we think, may be so considered."

U. S. *vs.* Coe, 155 U. S., 76.

V.

In Conclusion.

The pecuniary interests of the parties litigant herein are very great; but such private interests sink into utter insignificance compared with the supreme importance of the great public interests necessarily involved.

Rarely indeed, if ever, has this Court, in a single case, been called upon to consider and to determine the respective powers and duties of every—the supreme Legislative, Executive and Judicial—department of the government of the nation, and to restrain and to prohibit the unconstitutional encroachment of one department upon the exclusive legitimate sphere of another.

As the occasion has arisen, and the duty devolves, as of right and with propriety, upon the supreme judicial authority, it will speak "with no uncertain sound."

The opportunity is presented; the occasion demands it; the the Country and the Congress will be the better for it.

If the supreme executive and judicial authority of a Cabinet

Officer, acting strictly within the sphere of his authority can be boldly and hautily ignored and his official action repudiated by the Congress; if, in any cause pending and undetermined in a court of justice, the rights or interests—vested or incohate—of the humblest litigant, can be by Act of Congress—general or special—divested, disregarded or annulled, and too without notice, hearing or consideration,—legislative, executive or judicial—the sooner the people are authoritatively advised that such condition of affairs exists, under the sanction and authority of the Constitution, the better for the Country.

No such amazing pronunciamento from this tribunal is anticipated, or feared.

That no man shall be deprived of life, liberty or property "without due process of law," is a restriction upon all the powers of government—State and National.

That no one shall be denied "the equal protection of the laws," is a specific limitation upon the powers of State government.

But to hold that the latter restriction is not alike obligatory upon the powers of the National Government is as unreasonable as absurd.

To say that "by due process of law," one may be denied "the equal protection of the laws" is a judicial solecism which finds no support in reason or in justice.

Special or class legislation—State or National—is inhibited by every consideration and principle of natural right and justice

In the language of Chief Justice Wilmot in Collins *vs.* Blantom, 2 Wils., 341.

"Est boni judicis ampliare jurisdictionem."

"And I say—

"Est boni judicis ampliare justitiam."

"FIAT JUSTITIAM; RUAT COELUM."

Respectfully submitted,

HENRY B. O'REILLY,

Christmas, 1895. *Attorney for Relator.*